SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 446

MICHAEL GLUS, PETITIONER

vs.

BROOKLYN EASTERN DISTRICT TERMINAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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A In the United States Circuit Court of Appeals For The Second Circuit

MICHAEL GLUS, PLAINTIFF-APPELLANT

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT-APPELLEE

Appendix to Appellant's brief

Filed December 27, 1957

[File endorsement omitted.]

1 In United States District Court for the Southern District of New York

Relevant paragraph of plaintiff's complaint

9. Subsequent thereto defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time.

2 In the United States District Court Southern District Civil Action #120–77

Defendant's notice of motion to dismiss plaintiff's complaint

May 17, 1957

[Title omitted.]

Please take notice that upon the complaint herein and the affidavit of Jeremiah G. Mahony, duly verified the 17th day of May, 1957, the undersigned will move this Court at a Stated Term for the hearing of motions, Room 506 to be held at the Federal Courthouse, Foley Square, New York, New York on the 4th day of June, 1957, for an order under Rule 107, subdivision 5, of the Rules of Civil Practice, dismissing the complaint on the ground that it is barred by the Statute of Limitation, together with the costs and disbursements of this action.

Please take further notice that answering affidavits are to be served at least five days prior to the return day of the motion.

THOMAS P. CURTIN,
Attorney for Defendant,
Office and P. O. Address,
116 John Street, New York, New York.

3 In the United States District Court, Southern District of New York

#23782

Civil 120–77

MICHAEL GLUS, PLAINTIFF

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT

Appearances: Seymour Schwartz, Esq., Attorney for Plaintiff; Thomas P. Curtin, Esq., Attorney for Defendant.

Opinion

September 25, 1957

BRYAN, *District Judge:*

This is an action under the Federal Employers' Liability Act, 45 U. S. C. Section 51 et seq., to recover damages for an industrial disease allegedly contracted by plaintiff in 1952 as a result of working under unsafe conditions while employed by the defendant.

Defendant now moves to dismiss the complaint under Rule 12 (b) (6), F. R. C. P., on the ground that it appears from the face of the complaint that the action has not been timely brought.

The statute of limitations may be raised on a mo-
4 tion to dismiss the complaint where it appears from the face of the complaint that the action was not commenced within the statutory period. Kincheloe v. Farmer, 7 Cir., 214 F. 2d 604; Eastern Pipe Line Co. v. Parish, 10 Cir., 168 F. 2d 238; Berry v. Chrysler Corp., 6 Cir., 150 F. 2d 1002; Drabkin v. Gibbs & Hill, D. C. S. D. N. Y., 74 F. Supp. 758, 762; Sinclair v. United States Gypsum Co., D. C. W. D. N. Y., 75 F. Supp. 439, 442. Plaintiff's contention to the contrary is mistaken.

Section 6 of the Federal Employers' Liability Act, 45 U. S. C. Section 56, provides:

"No action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued."

The present action was commenced on May 2, 1957, concededly more than three years after the cause of action accrued. However, the complaint alleges in paragraph 9:

"9. Subsequent thereto defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time."

Plaintiff contends that if these allegations are taken to be true, as they must be on this motion, the three year statute of limitations in the Act has been tolled by the defendant's fraud or misrepresentations.

The question presented is whether a cause of action under the Federal Employers' Liability Act is irretrievably lost upon the expiration of the three year period of limitation in Section 6 of the Act, or whether the right which the plaintiff asserts remains alive if plaintiff's failure to sue within three years is brought about by defendant's fraud.

The cases are in sharp conflict on this question.

There has long been a distinction drawn between ordinary statutes of limitation and time limitations prescribed in statutes which create the liability and confer the right of action. Where the time limitation is an integral part of the statute creating the substantive right, the time for commencing the action prescribed in the statute is not extended by reason of fraud or concealment which might work an extension of ordinary statutes of limitation. Pollen v. Ford Instrument Co., 2 Cir., 108 F. 2d 762; Bell v. Wabash Ry. Co., 8 Cir., 58 F. 2d 569, 571; Sgambati v. United States, 2 Cir., 172 F. 2d 297, certiorari denied, 337 U. S. 938; United States ex rel. Nitkey v. Dawes, 7 Cir., 151 F. 2d 639, certiorari denied, 327 U. S. 788; Larson v. Port of New York Authority, D. C. S. D. N. Y., 17 F. R. D. 298, 300.

One line of cases holds that the Federal Employers' Liability Act is such a statute creating a substantive right, and that Section 6 is a "built in" statute of limitations. The filing of the complaint within three years after the cause of action accrued is therefore held to be a condition precedent to recovery, the cause of action is extinguished after the running of that period, and the period cannot be extended by the claimant's inability to sue by reason of infancy

or insanity or by delay caused by defendant's fraud or concealment. Damiano v. Pennsylvania R. Co., 3 Cir., 161 F. 2d 534, certiorari denied, 332 U. S. 762; American R. Co. of Porto Rico v. Coronas, 1 Cir., 230 F. 545, 546; Bell v. Wabash Ry. Co., supra; Matter of Ahern v. South Buffalo Ry. Co., 303 N. Y. 545, 568, aff'd, 344 U. S. 367. Cf. Central Vermont Ry. v. White, 238 U. S. 507, 511.

This view was expressed by the Court of Appeals of this Circuit in Osbourne v. United States, 2 Cir., 164 F. 2d 767, 768, as follows:

"Generally, where a statute creates a cause of action which was unknown at common law, a period of limitation set up in the same statute is regarded as a matter of substance, limiting the right as well as the remedy. Filing a complaint within the prescribed period is a condition precedent to recovery, and the cause of action is extinguished after the running of the period. The general rule, developed chiefly with respect to the Federal Employers' Liability Act, §§ 1–10, 45 U. S. C. A. §§ 51–60, has been applied also to the period of limitations in the Jones Act, which incorporates the period in the Employers' Liability Act, and to the Suits in Admiralty Act. The practical results of the application of this rule have been * * * that the period of limitation under any of these Acts will not be extended, as it would be in the case of an ordinary statute of limitations, by a claimant's disability to sue because of infancy or insanity or by a delay occasioned by the fraud of the defendant * * *."

However, the language just quoted is not a holding of the court but is dictum. In Osbourne, the plaintiff sued to recover for injuries suffered prior to December 8, 1941, through the alleged negligence of the owners of the vessel on which he was employed as a crew member. On December 8, 1941 he and the rest of the crew were interned by the enemy. He returned to this country in October 1945 and commenced suit on July 31, 1946. The respondent excepted to the libel on the ground that it had not been filed within the two year period of limitations permitted under the Suits in Admiralty Act, 46 U. S. C. Section 745, or the three year period under the Jones Act, 46 U. S. C. Section 688. The court held that since the plaintiff had been denied access to the courts during the period of his internment, both his rights and his remedies had been suspended during that period, and that the statute of limitations was tolled dur-

ing the time that the courts were thus inaccessible to him, whether the statute was substantive or procedural.[1]

8 In Sgambati v. United States, supra, the Court of Appeals, on the basis of its language in Osbourne which has been quoted, held expressly that infancy did not toll the "built in" statutes of limitations contained in the Suits in Admiralty Act and the Public Vessels Act, stating:

"The unusual ground for exception to the statutory period we found to exist in the Osbourne case (i. e., impossibility of access to the courts within the period) was absent here."

The Sgambati case is in accord with the weight of authority Damiano v. Pennsylvania R. Co., supra; Pollen v. Ford Instrument Co., supra; United States ex rel. Nitkey v. Dawes, supra; Bell v. Wabash Ry. Co., supra. *Cf.* The Harrisburg, 119 U. S. 199, 214; Central Vermont Ry. v. White, supra. It lays down the rule in this circuit that the "built in" statute of limitation in the Federal Employers' Liability Act, the Jones Act, the Suits in Admiralty Act, and similar statutes, will not be extended by disability to sue because of infancy or insanity or by delay occasioned by the defendant's fraud.

It may be noted, however, that there are well-reasoned cases to the contrary. Scarborough v. Atlantic Coast Line R. Co., 4 Cir., 178 F. 2d 253, certiorari denied, 339 U. S. 919, 190 F. 2d 935, 202 F. 2d 84; Toran v. New York, N. H. & H. R. Co., D. C. D. Mass., 108 F. Supp. 564; Fravel v. Pennsylvania R. Co., D. C. D. Md., 104 F. Supp. 84. These cases hold that

9 where a plaintiff in an action under the Federal Employers' Liability Act has been fraudulently induced not to bring his action within the three year period by means of misrepresentations of fact made by the defendant, the statute is tolled. It is reasoned that (1) the Federal Employers' Liability Act did not create a new cause of action unknown at common law, but one closely related to the common law action of an employee against his negligent employer; (2) that the probable purpose of the time limitation in that Act was not to expunge plaintiff's rights absolutely after the expiration of a three year period, but rather to have one uniform

[1] Other cases tolling "built in" statutes of limitations on the theory that war conditions made the courts completely unavailable to plaintiffs during the limitation period, are Borovitz v American Hard Rubber Co., D. C. N. D. Ohio, 287 F. 368; Frabutt v. New York, Chicago & St. Louis R. Co., D. C. W. D. Pa., 84 F. Supp. 460.

statutory period of limitation throughout the country; that the Act expressly forbids any "device whatsoever, purpose or intent of which shall be to enable any common c rier to exempt itself from any liability", 45 U. S. C. Sect 55, and that fraudulent representations by the carrier resu ing in postponement of commencement of the action beyo the three year period of limitation constitute such a devi (4) that the wording of the limitation provisions in the A is not as imperative as in other acts where Congress sought merely to bar the remedy but to destroy the liability; and t (5) since the policy of the Act is to give employees broa rights than in common law, it would be anomalous to hold Federal law less favorable to a defrauded employee than common law.

The reasoning of these cases is not unpersuasive. I I feel that I am bound by the decisions of the Court
10 Appeals of this Circuit on the subject which are su ported by the weight of authority. I therefore h that plaintiff's failure to bring his action within the three y period prescribed by the statute bars him from recovery a that the period of time within which suit must be broug was not extended by the alleged fraud or misrepresentatio of the defendant.

This determination makes it unnecessary to pass on t further question of whether, assuming the statute could tolled by fraud or misrepresentation, the allegations in pa graph 9 of the complaint here would be sufficient, if esta lished, to toll it. Cf. Hilliard v. Pennsylvania R. Co., 6 C 73 F. 2d 473, 476.

The motion to dismiss is granted. Since there is no w in which the defect contained in the complaint could remedied by amendment, the complaint is dismissed witho leave to plead over. Larson v. Port of New York Authori supra.

(S) FREDERICK V. P. BRYAN,
U. S. D. J.

11 In United States District Court for the Southern District of New York

Order appealed from

September 25, 1957

The motion to dismiss is granted. Since there is no way in which the defect contained in the complaint could be remedied by amendment, the complaint is dismissed without leave to plead over. Larson v. Port of New York Authority, supra.

(S) FREDERICK V. P. BRYAN,
U. S. D. J.

12 In United States Court of Appeals for the Second Circuit

Statement Under Rule 15 (b)

Suit was instituted under the Federal Employers' Liability Act (Title 45, United States Code, Section 51 et seq.) on May 2, 1957. By motion dated May 17, 1957, defendant moved to dismiss the complaint on the ground that the action was barred by the statute of limitations. In an opinion and order dated September 25, 1957, Bryan, D. J., granted the motion to dismiss without leave to plead over.

By motion dated October 8, 1957, plaintiff moved for leave to appeal in Forma Pauperis. The motion was granted on October 18, 1957, by Ryan, D. J. On October 21, 1957, plaintiff filed Notice of Appeal.

13 In the United States Court of Appeals for the Second Circuit

No. 248. October Term, 1957

Argued March 13, 1958

Docket No. 24910

MICHAEL GLUS, PLAINTIFF-APPELLANT

v.

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT-APPELLEE

Before: CLARK, Chief Judge, HINCKS, Circuit Judge, and BRENNAN, District Judge.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FREDERICK V. P. BRYAN, JUDGE

Plaintiff appeals from the dismissal of his action under the Federal Employers' Liability Act, 45 U. S. C. §§ 51 et seq., as barred by the statute of limitations. D. C. S. D. N. Y., 154 F. Supp. 863.

Seymour Schwartz, New York City, for plaintiff-appellant.
Thomas P. Cunin, New York City, for defendant-appellee.

14 *Per curiam opinion*

April 7, 1958

On May 2, 1957, the plaintiff brought suit under the Federal Employers' Liability Act, 45 U. S. C. §§ 51 et seq., to recover damages for an industrial disease allegedly contracted by him in 1952 as a result of working for defendant under unsafe conditions. In granting the defendant's motion to dismiss, Judge Bryan wrote a cogent opinion, D. C. S. D. N. Y., 154 F. Supp. 863, pointing out that, while there were decisions the other way, this Court was committed to the majority view that a period of limitation, "built in" the statute as is the three-year bar here, 45 U. S. C. § 56, could not be tolled by the defendant's fraud or misrepresentations. See the opinions of the late Judge Frank in Osbourne v. United States, 2 Cir., 164 F. 2d 767, and Sgambati v. United States, 2 Cir., 172 F. 2d 297, certiorari denied 337 U. S. 938. For the reasons well stated by Judge Bryan, we think we should not attempt to retrace our footsteps now, but may well await resolution of the conflict by the Supreme Court.

We are the more content to follow this course because the barrenness of the allegations here suggests a doubt as to any real fraud. Notwithstanding the explicit mandate of F. R. 9 (b) that in all avertments of fraud or mistake "the circumstances constituting fraud or mistake shall be stated with particularity," the plaintiff says only that "subsequent thereto"—the accruing of the cause—"defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time." This could be merely an unintent-

tional misstatement or expression of opinion on a matter of law. It lacks the equitable appeal of circumstances disclosed in decisions or discussions reaching the opposite conclusion. The order of dismissal is affirmed.

15 In the United States Court of Appeals for the Second Circuit

Present: Hon. Charles E. Clark, Chief Judge; Hon. Carroll C. Hincks, Circuit Judge; Hon. Stephen W. Brennan, District Judge.

MICHAEL GLUS, PLAINTIFF-APPELLANT

v.

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT-APPELLEE

Judgment

April 7, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

16 [File endorsement omitted.]

17 [Clerk's certificate to foregoing transcript omitted in printing.]

18 Supreme Court of the United States

No. 81 Misc., October Term, 1958

MICHAEL GLUS, PETITIONER

vs.

BROOKLYN EASTERN DISTRICT TERMINAL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Order allowing certiorari

October 13, 1958

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 446 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1958